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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 179.

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT,

Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent.

BRIEF OF PETITIONER

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The opinion of the Circuit Court of Appeals is reported in 49 Fed. (2d) 866. The opinion of the District Court is not reported.

This case comes before this Court on the writ of certiorari granted October 19, 1931.

In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 179.

HERBERT S. DANIEL, TRUSTEE OF PETERS TRUST COMPANY, BANKRUPT,
Petitioner,

vs.

GUARANTY TRUST COMPANY OF NEW YORK,
Respondent.

BRIEF OF PETITIONER

STATEMENT OF THE CASE

Peters Trust Company was organized under the Laws of the State of Nebraska, with its principal place of business at Omaha, Nebraska, and conducted a mortgage loan, bond brokerage, and general trust business. It was not a banking corporation, as inadvertently stated in the opinion of the Circuit Court (R. 45) and was, therefore, subject to the Bankruptcy Act. *Gamble vs. Daniel,* (8 CCA) 39 Fed. (2d) 447.

On November 25, 1929 an insolvency proceedings was started in the State Court and Peters Trust Company was adjudicated insolvent and a receiver appointed to liquidate its affairs. On November 27, 1929, an involuntary petition was filed in the United States District Court for the District of Nebraska at Omaha by certain of its creditors to have it adjudicated a bankrupt. While this action was pending, on December 10, 1929, Peters Trust Company filed a voluntary petition for adjudication in bankruptcy in the same Court and was thereupon, on December 10, 1929, adjudicated bankrupt, and on the same day Herbert S. Daniel was appointed and qualified as receiver of the bankrupt. Later, on March 17, 1930, Herbert S. Daniel, the petitioner herein, was elected and qualified as trustee in bankruptcy and is still acting as such trustee.

Three separate corporations are referred to in these proceedings: first, Peters Trust Company, which will be designated in this brief as the bankrupt; second, The Guaranty Company of New York, which conducts a bond and security business with its principal office in New York and with branch offices in other cities; third, The Guaranty Trust Company of New York, the respondent herein, which operates a bank and trust business in New York.

In the ordinary conduct of its business on November 18, 1929, before the proceedings for liquidation were started, the bankrupt purchased from *The Guaranty Company* Canadian National Railway bonds of the par value of $10,000.00, New York, Chicago & St. Louis Railway notes of the par value of $5,000.00, and Texas Corporation

bonds of the par value of $8,000.00. These securities were delivered in the regular course of business without payment and, soon thereafter, the insolvency proceeding was brought in the State Court for the liquidation of the Bankrupt and a receiver was appointed who took possession of the bankrupt's assets. After the adjudication in bankruptcy, the securities in question came into the custody and possession of the petitioner, pursuant to the turnover order issued by the Bankruptcy Court against the State Court receiver. *Gamble vs. Daniel,* (8 CCA), 39 Fed. (2d) 447.

The bankrupt up to and at the time of its suspension kept a deposit account with the respondent, Guaranty Trust Company of New York. That account on suspension of business, November 25, 1929, showed a credit in favor of the bankrupt of $31,046.53. At the same time the bankrupt was indebted to the respondent on a demand loan account in the sum of $154,200.00. The respondent, as it had a right to do, applied the bankrupt's credit balance of $31,046.53 as a credit on its demand loan account made a counter-balancing debit of the same sum in the deposit account, and closed the latter account in balance. The right to make this setoff is not questioned. The statements of account rendered by respondent are the basis of the figures here given (Exhibit A, R. 16-18; Exhibit B, R. 41).

The respondent held collateral security, deposited by the bankrupt, of a value largely in excess of the sum due on the bankrupt's demand loan account. The bankrupt was the loan correspondent of the Prudential Insurance Company of America for this district and cleared the

loans made for the Insurance Company through the respondent. On the morning of November 25, 1929, respondent had mortgages of the par value of approximately $156,000.00 in the course of clearing with the Insurance Company. All of these mortgages were ultimately cleared and the respondent collected the face of the mortgages plus the accrued interest for the account of the petitioner. After setting off, as it had a right to do, the amount due it from the bankrupt on its demand loan account, and fully satisfying said account, the respondent on February 13, 1930, held a balance for the petitioner of $3,272.20 (R. 17-18). This was increased by subsequent collections to $31,224.60 on March 14, 1930 after all the loans had cleared. The money collected on this excess collateral was the subject of the turnover order now in question.

As above noted, the bankrupt's checking account was impounded and applied by the respondent on the demand loan account on November 25, 1929. On November 26, 1929, an officer of the bankrupt called at the New York office of the respondent and informed Mr. Curtis, a vice-president of respondent, that Peters Trust Company had been taken over by the State for liquidation in insolvency proceedings, and found that respondent had already been so advised (R. ~~14-15~~ 15-16). On the next following day, November 27, 1929, after Peters Trust Company was known to be in process of liquidation and to have committed an act of bankruptcy, and after it had impounded

and applied Peters Trust Company's bank account as above stated, the respondent purchased the account of The Guaranty Company against the bankrupt. Obviously, an account so purchased after insolvency, pending a judicial proceeding for liquidation of the bankrupt, cannot be made the basis of a setoff against respondent's liability for the subsequent collection of excess collateral that had not been pledged to secure payment of the assigned account.

Respondent, as such assignee of The Guaranty Company, apppeared voluntarily before the referee in bankruptcy and, on April 2, 1930, filed an application and petition for the reclamation of the aforementioned negotiable securities, alleging that their sale by respondent's assignor was subject to rescission, because the purchase money was not paid in accordance with the terms of sale, and that their delivery to the bankrupt was obtained by fraud. The prayer of the applicant (the respondent here) was:

> "Wherefore your petitioner prays that an order be entered instructing and directing, Herbert S. Daniel, Trustee of said Peters Trust Company, Bankrupt, to deliver to your petitioner the bonds described above and that your petitioner have such other and further relief as may seem just and proper." (R. 1-5).

Your petitioner, the trustee in bankruptcy, on April 3, 1930, filed with the referee in bankruptcy an answer to respondent's petition for reclamation, in which he denied the alleged fraud and denied that the sale of the

securities was conditioned on payment by the bankrupt contemporaneously with the delivery, and alleged their ownership by the bankrupt. The answer also alleged that customers of the bankrupt had previously ordered and paid the bankrupt for certain of said securities, and claimed ownership, and asked that they be made parties and directed to assert their claims, if any, thereto.

The Trustee further alleged in his answer that the Guaranty Trust Company of New York, the applicant in said proceeding, had in its possession, on deposit, approximately the sum of $31,224.60 which belonged to the bankrupt estate, and which was accumulated by the Receiver and Trustee of said bankrupt estate after the date it was adjudicated bankrupt; the trustee had made due demand upon the petitioners (the respondent here) for delivery of the said money, but the Guaranty Trust Company of New York had refused to deliver the said funds or any part thereof, and should be required to account for all funds collected by it on behalf of the receiver or trustee of Peters Trust Company, Bankrupt, or the bankrupt estate, and be directed to deliver the same forthwith to Herbert S. Daniel, Trustee.

The prayer of the answer was in part:

"The Trustee further prays for an order directing the Guaranty Trust Company of New York to account to him for all funds collected or now held by it belonging to the bankrupt estate, and be ordered to deliver the same forthwith to your trustee, and

for such other relief as to the Court may seem just and equitable."

The record shows that on April 5, 1930, the referee made an order requiring the persons named in the trustee's answer, as claimants of certain of said securities, to appear by April 16, 1930, and set forth in writing any interests claimed by them, respectively, in said securities; that the order was served, and five of said persons presented their claims; an order was made by the referee setting the matter for hearing on April 23, 1930, and the hearing was adjourned to April 25, 1930, "at the request of H. M. Baldrige, attorney for the Guaranty Trust Company;" and all parties appeared in person or by attorney, at said last named date, when the matter was heard and determined by the referee (Rec. ~~18-19~~ 19-22).

Before the hearing on the merits was taken up, respondent's counsel moved orally to strike out the paragraphs of petitioner's answer alleging that customers of the bankrupt were claiming certain of the securities in question and that the respondent had collected and received money on behalf of the bankrupt estate since the adjudication of bankruptcy which it should deliver over to respondent as trustee. The referee overruled this motion, and counsel for respondent then dismissed its petition for reclamation, and made the following statement: "The Guaranty Trust Company, by its attorneys, aren't interested in this proceeding. We do not believe we are in court, and we are not interested to stay" (R. 8-10).

Counsel for respondent thereupon withdrew, and the referee proceeded with the hearing on the petitions of interveners, and the answer of the petitioner, as trustee (R. 10-21). The evidence showed that the trustee had received from the respondent after filing his answer the sum of $7,500.00, leaving a balance of $23,724.60 still in respondent's hands. A turnover order against respondent covering said balance of $23,724.60 was entered by the referee, based upon the general finding that the allegations in the trustee's answer were true and the further finding:

> "And the court further finds that the Guaranty Trust Company has in its hand the sum of $23,724.60 in cash belonging to Herbert S. Daniel, trustee of the above named bankrupt; that said sum was accumulated by Herbert S. Daniel, as receiver, subsequent to February 12, 1930, said moneys having been collected by said Guaranty Trust Company for and on behalf of said bankrupt estate from the Prudential Insurance Company of America, on mortgages made by the bankrupt and sold to the Prudential Insurance Company of America, and that said Guaranty Trust Company has not made herein any claim to the said fund of $23,724.60, and is merely holding the said sum of $23,724.60 as custodian and agent of Herbert S. Daniel, as trustee of the above named bankrupt, and that said sum should be delivered forthwith to said trustee" (R. 20).

The order provides in part:

> "And it is further ordered that the Guaranty Trust Company of New York, the applicant herein, be, and it is hereby ordered and directed to forthwith pay over to Herbert S. Daniel, as trustee of the above bankrupt estate, the sum of $23,724.60, of moneys in the hands of said Guaranty Trust Company of New York, belonging to Herbert S. Daniel, trustee of said

bankrupt estate, with interest thereon at the rate of 7 per cent per annum fom this date."

On respondent's petition for review, the District Court affirmed the order of the Referee, except as to the allowance of interest (R. 26). The respondent appealed to the Circuit Court of Appeals, assigning as the sole error that the Referee was without jurisdiction to make the turnover order. The lack of jurisdiction was based on three grounds: First, the order was made after the respondent had dismissed its petition for reclamation; Second, that the money was in the respondent's possession outside the territorial jurisdiction of the Bankruptcy Court; Third, that it was an adverse claimant to the money. No error was alleged as to the facts found by the referee. The decree affirming the referee's turnover order was, on May 4, 1931, reversed by the United States Circuit Court of Appeals for the Eighth Circuit (R. 45-50). *Guaranty Trust Company of New York, vs. Daniel,* 49 Fed. (2d) 866.

SPECIFICATION OF ERRORS RELIED UPON

1. The Circuit Court erred in holding that the referee has no jurisdiction to grant relief on an unrelated matter within the jurisdiction of the Bankruptcy Court against a person who has voluntarily invoked the aid of the bankruptcy court for his own relief.

2. The Circuit Court erred in failing to hold that Equity Rule 30 applies to equitable administrations in bankruptcy pending before the referee so as to permit the trustee in his answer to "set out any setoff or counterclaim against the plaintiff which might be the subject of an independent suit in equity against him * * * so as to enable the court to pronounce a final judgment in the same suit on both the original and the crossclaims".

3. The Circuit Court erred in failing to hold that even if Equity Rule 30, as such, is not binding in proceedings in bankruptcy, nevertheless, to facilitate the speedy, economical, and orderly administration in bankruptcy, the trustee can, by appropriate allegations in his answer, obtain any affirmative relief within the jurisdiction of the bankruptcy court against a petitioner before the court, whether the affirmative relief sought grows out of the same transaction or out of separate and unrelated transactions.

4. The Circuit Court erred in holding that the referee was without jurisdiction to grant the relief sought by the trustee. The respondent sought relief by way of

reclamation of certain securities. The referee could have made the order granting this relief, if the proofs warranted, conditional upon the respondent's turning over the funds of the bankrupt estate in its hands. The respondent failing in its proof or dismissing its petition after the issues were made up could not oust the court of its jurisdiction over the respondent that had already attached.

5. The Circuit Court erred in failing to hold that the litigant cannot, himself, invoke the jurisdiction of the court and the particular form of the proceeding (summary as well as plenary) and then object to the disposition of the issues which the trustee may raise either as a defense to his petition or as a basis of a counterclaim. The consent thus given can not be subsequently withdrawn.

6. The Circuit Court erred in not affirming the order of the District Court, which affirmed the turnover order of the referee.

SUMMARY OF ARGUMENT

I.

Jurisdiction of Subject Matter

1. A referee in bankruptcy has summary jurisdiction to order a person holding property belonging to the bankrupt estate against which he has no adverse claim to deliver the property to the trustee in bankruptcy.

Bankruptcy Act, §23 (U. S. Code, Tit. 11, §49);

Bankruptcy Act, §2 (7) (U. S. Code, Tit. 11, §11);

Bankruptcy Act, §33 (U. S. Code, Tit. 11, §61);

Bankruptcy Act, §38 (4) (U. S. Code, Tit. 11, §66);

Bankruptcy Act, §36 (U. S. Code Tit. 11, §64);

Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405;

Harrison v. Chamberlain, 271 U. S. 191, 70 L. Ed. 897.

2. A mere assertion of an adverse claim does not oust the court of jurisdiction. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the claim is substantial or merely colorable, frivolous, or baseless. If the claim is of the latter class, it may be disregarded and the court may proceed the same as though no adverse claim had been asserted.

Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405.

Gamble v. Daniel, (CCA 8), 39 Fed. (2d) 447.

May v. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870.

3. A claimant cannot acquire an adverse interest in property belonging to the bankrupt estate that comes into his possession after adjudication in bankruptcy.

May v. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870, p. 117;

Reed v. Barnett National Bank, (CCA 5) 250 Fed. 983;

Knapp & Spencer Co. v. Drew (CCA 8), 160 Fed. 413;

Eppley v. Baylor, (CCA 8), 293 Fed. 305;

Harrison v. Chamberlain, 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897.

4. The Court has the same summary jurisdiction to order the delivery of money or bank deposits as it has to order the delivery of tangible property, real or personal.

May v. Henderson, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870.

Knapp & Spencer Co. v. Drew (CCA 8), 160 Fed. 413.

Reed v. Barnett National Bank (CCA 5), 250 Fed. 983.

In re Davis (D. C. Texas), 119 Fed. 950.

In re Walker Grain Co. (CCA 5), 295 Fed. 120.

In re Radley Steel Const. Co. (D. C., New York) 212 Fed. 462.

5. The Bankruptcy Court has jurisdiction to adjudicate adverse claims on property in its possession.

Bankruptcy Act, §70 (a) (U. S. Code, Tit. 11, §110).

Murphy v. John Hofman Co., 211 U. S. 562, 53 L. Ed. 327.

Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157.

U. S. Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 56 L. Ed. 1055.

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734;

Straton v. Andy New, Jr., 283 U. S. 318.

Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 68 L. Ed. 770.

II.

Jurisdiction of the Person

1. The presentation by the trustee of the cross-demand in his answer to the respondent's petition for reclamation, and the power of the Court to determine the issue so presented, are sanctioned by Equity Rule 30 and General Order in Bankruptcy XXXVII.

Bankruptcy Act, §2 (U. S. Code, Tit. 11, §11).

Fidelity Trust Company vs. Gaskell (CCA 8) 195 Fed. 865.

Remington on Bankruptcy, Vol. 1, p. 48, §23.

Bankruptcy Act, §38 (4) (U. S. Code, Tit. 11, § 66).

Bankruptcy Act, §30 (U. S. Code, Tit. 11, §53).

In re Cunney (D. C. Mass.), 225 Fed. 426.

International Harvester Co. v. Carlson, (CCA 8) 217 Fed. 736.

In re Hughes (CCA 2), 262 Fed. 500.

No-Leak-O Piston Ring Co. v. Norris, (CCA 2) 277 Fed. 951.

Buffalo Specialty Company v. Vancleef, 217 Fed. 91, (D. C. Ill.).

Champion Spark Plug Co. v. Champion Ignition Co., 247 Fed. 200 (D. C. Mich.)

Marconi Wireless Telegraph Co. v. National Electric Signaling Co., 206 Fed. 295.

Electric Boat Co. v. Lake Torpedo Boat Co., 215 Fed. 377.

Goodno v. Hotchkiss, 230 Fed. 514.

Harper Bros. v. Klaw, 232 Fed. 609.

Dykes v. Widdows, (CCA 8), 31 (2d) 745.

Champlain Realty Co. v. Brattleboro, 260 U. S. 366, 43 S. Ct. 149, 67 L. Ed. 309.

2. If petitioner has misconceived the purpose and effect of the General Order and the Equity Rules are only "to be looked to for analogies" in the case at bar, there is still ample reason for approving the procedure followed by the referee. Public policy requires that bankrupt estates be speedily administered without unnecessary litigation. Both parties were before the Court and the procedure adopted adjudicated all the controversies between them.

Murphy v. Hofman Co., 211 U. S. 562, 53 L. Ed. 327;

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734;

White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183;

Dayton v. Stanard, 241 U. S. 588, 60 L. Ed. 1190.

3. The appellant, by coming into the Bankruptcy Court and seeking affirmative summary relief, thereby gave the Court jurisdiction of its person, as to such is-

sue, and all such defenses, including affirmative claims that may be properly litigated in that summary proceedings. Consent thus given cannot be withdrawn so as to deprive the Court of jurisdiction so obtained.

Operative Piano Co. v. First Wisconsin Trust Co., (CCA 7) 283 Fed. 904.

In re Bennett (CCA 7) 285 Fed. 351.

In re Pennsylvania Coffee Co., (D. C.) 8 Fed (2d) 98.

Triangle Electric Co. v. Foutch (CCA 8) 40 Fed. (2d) 353.

In re Dernburg & Son, Inc., (CCA 2), 5 Fed. (2d) 37.

In re Barnett (CCA 7) 12 Fed. (2d) 73.

Wiswall v. Campbell, 93 U. S. 347, 23 L. Ed. 923.

4. Equitable terms may be imposed by a Court as a condition of granting an order of reclamation.

In re Hooven-Owens-Rentschler Co., (CCA 6), 195 Fed. 424.

Remington on Bankruptcy, Vol. 5, p. 602, §2455.

5. Respondent's withdrawal after the issues had been made up and the hearing entered upon did not defeat the jurisdiction, previously attached, to determine the issue raised by the answer of the trustee.

Vidal v. South American Securities Company (CCA 2), 276 Fed. 855.

Buffalo Specialty Company vs. Vancleef, (D. C.) 217 Fed. 91.

6. The speedy administration of the Bankruptcy Law requires the application of the modern equity prac-

tice which permits the adjudication of all controversies between the same parties in one suit.

Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405;
May v. Henderson, 268 U. S. 111, 69 L. Ed. 870;
Harrison v. Chamberlain, 271 U. S. 191, 70 L. Ed. 897.

7. The final decision of the Court is not a test of jurisdiction.

In re Small Shoe Co. (CCA 2) 5 Fed. (2d) 956.

8. Courts of Bankruptcy in exercise of their equity powers act in personam and have summary jurisdiction where a party voluntarily appears or can be served with process, regardless of the location of the res or domicile of the party.

Robertson v. Howard, 229 U. S. 254, 57 L. Ed. 1174.

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734.

Alco Film Corp. v. Alco Film Service (CCA 2), 234 Fed. 55.

Orinoco Iron Co. v. Metzel (CCA 6), 230 Fed. 40.

In re Britannia Mining Co. (D. C. Wis.), 197 Fed. 459.

In re Small Shoe Co., (CCA 2) 5 Fed. (2d) 956.
Staunton v. Wooden (CCA 9) 179 Fed. 61.

III.

Ancillary Jurisdiction Does Not Bar the Court of Primary Jurisdiction from Acting if the Non-Resident Party Voluntarily Appears Before It.

Babbitt v. Dutcher, 216 U. S. 102, 54 L. Ed. 402.
Elkus, Petitioner, 216 U. S. 115, 54 L. Ed. 407.

Robertson v. Howard, 229 U. S. 254, 57 L. Ed. 1174.

Bankruptcy Act, §2 (20) (U. S. Code, Tit. 11, §11).

Shortridge v. Utah Savings & Trust Co., (CCA 10) 40 Fed. (2d) 328.

IV.

WEIDHORN V. LEVY, 253 U. S. 268, 64 L. Ed. 898, Is Not Applicable to the Issues Raised in this Case.

V.

The Merits of the Case.

1. The case was correctly decided by the Referee.

2. As a matter of law, no setoff could exist. A debtor cannot acquire claims after insolvency and in contemplation of bankruptcy and use them as a setoff. Neither can the liens be obtained on the bankrupt's property acquired after bankruptcy.

Bankruptcy Act, §68 (U. S. Code, Tit. 11, §108).

Collier on Bankruptcy, 13 Ed., Vol. 2, p. 1618;

Remington on Bankruptcy, Vol. 4, p. 182 §§1465, 1466.

In re Shults, (D. C.) 135 Fed. 623.

VI.

Answer to Respondent's Theory.

General Phonograph Corp. v. Fanning (CCA 3), 6 Fed. (2d) 115.

In re Hooven-Owens-Rentschler Co. (CCA 6) 195 Fed. 424.

ARGUMENT.

But for the change in the procedure for review in bankruptcy matters, this case would have come before the circuit court on a petition to revise. *In re Wood*, (CCA 2), 278 Fed. 355. On a petition to revise, the appellate court will not examine the evidence, except to see that there is some evidence to support the findings of the lower Court. *Shea vs. Lewis* (CCA 8), 206 Fed. 877. The abolishment of the petition to revise does not impose upon the appellate court the duty to try every appeal *de novo;* on the contrary, the same rules are applied as existed before the change in the law. It is, therefore, unnecessary to enter upon a detailed consideration of the evidence. This is, also, true for the reason that the respondent in its petition for review to the district court (R. 22) and, in its assignment of errors on its appeal to the circuit court, made no contention that the findings of the referee are not supported by the record (R. ~~30-32~~ 31-34). We, therefore, must start with the proposition that the findings of fact of the referee are conclusively established and confine our examination to the sole question of whether or not on the established facts the referee had jurisdiction to enter the turnover order in question.

The important facts to be noted are:

1. The respondent entered its general appearance in the bankruptcy court by filing its petition for reclamation with the referee.

2. The trustee in his answer, by appropriate allegations by way of counterclaim in the nature of a cross-bill, sought the affirmative relief granted by the referee.

3. The respondent had in its possession $23,724.60 that it had collected after the adjudication in bankruptcy for the petitioner.

4. The respondent made no adverse claim and, on the evidence, it was found to have no adverse claim to any part of said money but was holding it as custodian or agent for the petitioner.

From these facts, it is asserted that the referee in bankruptcy had jurisdiction to enter the turnover order here in question.

The question of jurisdiction can properly be divided and considered under two headings: *first,* jurisdiction of the subject matter, and; *second,* jurisdiction of the person.

I.

JURISDICTION OF THE SUBJECT MATTER.

1.

A referee in bankruptcy has summary jurisdiction to order a person holding property belonging to the bankrupt estate against which he has no adverse claim to deliver the property to the trustee in bankruptcy.

This case is not a controversy between a trustee and an adverse claimant concerning property claimed by the trustee, which, unless by consent of the claimant, must be determined in a plenary suit in a court in which the bankrupt might have brought the suit if bankruptcy had not intervened. The jurisdiction is not, therefore, governed by Section 23 of the Bankruptcy Act. (U. S. Code, Tit. 11 §49) relating to plenary suits by trustees against adverse claimants.

Section 2 (7) of the Bankruptcy Act, (U. S. Code, Tit. 11, §11) invests courts of bankruptcy with jurisdiction at law and in equity to "cause the estates of bankrupts to be collected, reduced to money and distributed, *and determine controversies in relation thereto, except as herein provided.*"

Section 33 (U. S. Code, Tit. 11 §61) creates the office of Referee; and Section 38 (4) (U. S. Code, Tit. 11 §66) invests the referee with jurisdiction to: "perform such part of the duties, except as to questions arising out of the applications of the bankrupt for composition or discharge, *as are by this act conferred on courts of bankruptcy of their respective districts,* except as herein otherwise provided."

GENERAL ORDER XII provides that after the order of reference reaches the referee "all proceedings, except such as are required by the Act or by these General Orders to be had before the judge shall be had before the referee." Section 36 (U. S. Code, Tit. 11, §64) also prescribes the same oath for referees as were prescribed by judges of the United States courts.

This Court has determined that issues of the class now under consideration do not come under any of the exceptions of the bankruptcy act of questions reserved from the general powers conferred upon referees, and that the referee has power to act in the first instance on such matters and make a summary turnover order. *Mueller v. Nugent,* 184 U. S. 1-18; *Harrison v. Chamberlain,* 271 U. S. 191-195.

In the case of *Mueller v. Nugent,* supra, this Court said "We think the referee has the power to act in the first instance in matters such as this when the case has been referred and in aid of the courts of bankruptcy, an exercise in such cases 'much of the judicial authority of that court' ".

2.

A mere assertion of an adverse claim does not oust the court of jurisdiction. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the claim is substantial or merely colorable, frivolous, or baseless. If the claim is of the latter class, it may be disregarded and the court may proceed the same as though no adverse claim had been asserted.

It is thus evident that the test of jurisdiction is whether or not the person in possession has an *actual* adverse claim that he is asserting against the property. One of the leading cases on this point in the case of *Mueller vs. Nugent,* 184 U. S. 1. Chief Justice Fuller, speaking for the Court, said in part:

> "The proposition was that, as matter of law, where property of a bankrupt has come into the hands of a third party before the filing of the petition in bankruptcy, as the agent of the bankrupt, and to which he asserts no adverse claim, the bankruptcy court has no power by summary proceedings to compel the surrender of the property to the trustee in bankruptcy duly appointed.
>
> "In other words, the question reduces itself to this: Has the bankruptcy court the power to compel the bankrupt or his agent to deliver up money or other assets of the bankrupt, in his possession or that of some one for him, on petition and rule to show cause? Does a mere refusal by the bankrupt

or his agent so to deliver up oblige the trustee to resort to a plenary suit in the circuit court or a state court, as the case may be?

"If it be so, the grant of jurisdiction to cause the estates of bankrupts to be collected, and to determine controversies relating thereto, would be seriously impaired and in many respects rendered practically inefficient.

"The bankruptcy court would be helpless indeed if the bare refusal to turn over could conclusively operate to drive the trustee to an action to recover as for an indebtedness, or a conversion, or to proceedings in chancery, at the risk of the accompaniments of delay, complication, and expense, intended to be avoided by the simpler methods of the bankrupt law."

In *Gamble vs. Daniel,* (CCA 8), 39 Fed. (2d) 447, on p. 453, the court said:

"If such claim is only colorable or the property is so held for account of the bankrupt, the bankruptcy court has jurisdiction, summarily to 'direct an accounting and a payment over to the trustee or receiver appointed by the bankruptcy court.' *May vs. Henderson,* 268 U. S. 111, 115, 45 S. Ct. 456, 458; 69 L. Ed. 870."

This proposition is so thoroughly established, a lengthy citation of authorities is not required.

It is also equally well established that the bankruptcy court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the claim is substantial and adverse or merely colorable, frivolous, or baseless. This Court, in the case of *Mueller vs. Nugent,* 184 U. S. 1, 22 S. Ct. 269, 46 L. Ed. 405, on this point, said in part:

"But suppose that respondent had asserted that he had the right of possession by reason of a claim adverse to the bankrupt, the bankruptcy court had the power to ascertain whether any basis for such a claim actually existed at the time of the filing of the petition. The court would have been bound to enter upon that inquiry, and in doing so would have undoubtedly acted within its jurisdiction, while its conclusion might have been that an adverse claim, not merely colorable, but real even though fraudulent and voidable, existed in fact, and so that it must decline to finally adjudicate on the merits. If it erred in its ruling either way, its action would be subject to review."

In the case of *May vs. Henderson*, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870, Mr. Justice Stone, speaking for the court, said in part:

"Courts of bankruptcy do not permit themselves to be ousted of jurisdiction by the mere assertion of an adverse claim. The court has jurisdiction to inquire into the claim for the purpose of ascertaining whether the summary remedy is an appropriate one within the principles of decision here stated. Mueller v. Nugent, 184 U. S. 1, 46 L. Ed. 405, 22 Sup Ct. Rep. 269; Schweer v. Brown. 64 CCA 574, 130 Fed. 328, 195 U. S. 171, 49 L. Ed. 144, 25 Sup. Ct. Rep. 15; Herbert v. Crawford, 228 U. S. 204, 57 L. Ed. 800, 33 Sup Ct. Rep. 484; Re Ellis Bros. Printing Co., 156 Fed. 430. It may disregard the assertion that the claim is adverse if, on the undisputed facts, it appears to be merely colorable. Re Weinger, B. & Co., 126 Fed. 875; Re Rudnick & Co., 158 Fed. 223; Re Ransford, 115 CCA 560, 194 Fed. 658; Re Michaelis, 196 Fed. 718."

The adverse claim must be asserted to oust the court of jurisdiction; whether an adverse claim is being as-

serted must be determined from the pleadings. The court in *Gamble vs. Daniel,* (CCA 8), 39 Fed. (2d) 447, on page 453 said:

> "From the above authorities, it is clear that the bankruptcy court had jurisdiction to determine that this property was or was not 'adversely' held by the appellant; that such determination must rest upon the allegations of the claimant; and that, if such allegations be insufficient, a summary order of delivery might be made. The question is whether the allegations here are sufficient."

The respondent filed no reply to trustee's answer and nowhere in the pleadings is there the slightest suggestion that it claimed an adverse interest in said moneys. The respondent offered no evidence at the hearing of the referee. The Circuit Court concluded (R. 47): "Under these findings, there is no basis for any claim that the appellant was an adverse claimant, both because no such claim was asserted, and because the referee found that the money in question was the bankrupt's and had been received after bankruptcy proceedings had begun."

3.

A claimant cannot acquire an adverse interest in property belonging to the bankrupt estate that comes into his possession after adjudication in bankruptcy.

Even if the respondent had asserted an adverse claim, it is apparent that such assertion would be colorable merely since the funds in question were collected by the respondent long after the adjudication in bankruptcy. It is fundamental that no adverse claim can be made to funds received by the claimant after adjudication in bankruptcy. This Court, in the case of *May vs. Hender-*

son, 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870, on p. 117 said in part:

> "In consequence, any person acquiring an interest in property of the bankrupt or his assignees for the benefit of creditors, adverse to the creditors, after the filing of a petition, with notice of it, may be directed to surrender the property thus acquired by summary order of the bankruptcy court. Re Denson, 195 Fed. 854; Re Rudnick, 158 Fed. 223; and see White v. Schloerb, supra.
>
> "The rule is the same when a creditor secures payment of his debt from the bankrupt's estate after the filing of the petition. A summary order may be made, directing repayment of the money to the trustee in bankruptcy. Knapp & S. Co. v. Drew, 87 CCA 365, 160 Fed. 413; Re Leigh, 208 Fed. 486; Re R. & W. Skirt Co., 138 CCA 67, 222 Fed. 256; Re Columbia Shoe Co., 289 Fed. 465. A like rule has been applied where a bank secures payment of its debt by setting up its lien or right of counterclaim against a deposit account of the bankrupt or the bankrupt's assignee, created subsequent to the filing of the petition. Re Michaelis, 196 Fed. 718; Reed v. Barnett Nat. Bank, 163 CCA 233, 250 Fed. 983. See Farmers & M. Nat. Bank v. Wilkinson, 266 U. S. 503, ante, 408, 45 Sup. Ct. Rep. 144. Any other rule would leave the bankruptcy court powerless to deal in an effective way with those holding property for the bankrupt, who, pending the bankruptcy proceedings, wilfully dispose of it by placing it beyond the reach of the court. Bryan v. Bernheimer, 181 U. S. 188, 196, 45 L. Ed. 814, 819, 21 Sup. Ct. Rep. 557."

The facts of the case of *May vs. Henderson* are briefly: The bankrupt, within four months of adjudication, made a general assignment for the benefit of creditors. At the date of the assignment, the bankrupt was indebted to the bank. The assignee, who was the president of the

bank, opened a bank account and deposited the funds so collected therein. Some of these deposits were made before and some after the adjudication in bankruptcy and the bank sought to hold the same as a setoff on its note. On an order to show cause and a summary hearing, the bank was directed to deliver the said funds to the trustee of the bankrupt disregarding the adverse claim of the bank, based on its assertion of the right of setoff. This Court upheld the action of the lower court, thus affirming the jurisdiction of the bankruptcy court to summarily order the delivery of money and bank accounts to the trustee in bankruptcy when there was no actual adverse claim against the said fund and also held that no real adverse claim could exist against such funds.

In the case of *Reed vs. Barnett National Bank,* (CCA 5), 250 Fed. 983, the court announced the rule in the syllabus as follows:

> "A bank cannot acquire the right to setoff against an indebtedness to it money deposited by a bankrupt after the filing of the petition against him, so as to require a plenary suit by the trustee for its recovery, but may proceed by petition for a summary order in the bankruptcy proceedings."

The opinion of the court is, in part, as follows:

> "This being so, the $2,703.98 balance represents funds of the bankrupt received by the bank after the petition in bankruptcy was filed. The case presented is that of a creditor getting possession of funds of the bankrupt after the petition against him was filed, and setting up a claim of right to apply such sum to the bankrupt's debt to it. Before the bankrupt deposited these funds in the bank, the petition in bankruptcy had already become operative as 'a caveat

to all the world and in effect an attachment and injunction.' Before the bank acquired possession, the funds were already in the custody of the law. They were not subject to be withdrawn from the bankruptcy court's grasp by another acquiring actual possession of them from the bankrupt.

"* * * There was no color of right in the bank to retain funds received and kept under such circumstances The bank was incapable of acquiring an adverse claim upon funds received from the bankrupt after the petition against him was filed. The claim could not be regarded as an adverse one, existing when the petition in bankruptcy was filed, as the subject of it was in the bankrupt's possession thereafter, and the bank's claim was one that could not be made until it acquired possession.

"The trustee seeks an order requiring the delivery to him of assets of the bankrupt which were in the latter's possession subject to no lien, after the petition in bankruptcy was filed. A plenary suit is not necessary in such a case. The delivery to the trustee of the bankrupt's property so acquired and held after the court's control of it attached may be ordered in a summary proceedings." Citing cases.

The Eighth Circuit has several times recognized the correctness of this proposition. In *Knapp & Spencer Co. vs. Drew,* (CCA 8), 160 Fed. 413, the facts are briefly that after the filing of an involuntary petition, a receiver was appointed, but the receiver failed to qualify and, on application of the bankrupt, was dismissed and the money in his hands returned to the bankrupt. The bankrupt then negotiated a settlement with certain of his creditors on a basis of 40% of their demands, but the bankruptcy proceedings had not been dismissed and later an adjudication in bankruptcy was entered. The trustee then

brought this summary proceeding before the referee to require the creditors, who had received this money, to deliver the same to him. The court, on p. 415, said in part:

> "Appellant first contends that it was an adverse claimant of the money in question and could not be proceeded against summarily by motion, but was entitled to defend itself and justify its adverse claim in a plenary suit instituted by the trustee for the recovery of the money. This position, we think is totally untenable."

In *Eppley vs. Baylor*, (CCA 8), 293 Fed. 305, a state court receiver had been appointed for the hotel properties belonging to the bankrupt. Later an involuntary petition in bankruptcy was filed. No adjudication was entered for a period of nearly two years after the filing of the petition. In the interim between the filing of the petition and the adjudication in bankruptcy, the state court receiver sold and conveyed the hotel in question to Mr. Eppley and the sale was duly confirmed by the state court. After the appointment of the trustee in bankruptcy, the trustee brought this summary proceedings before the referee to require the turnover of the property to him. Eppley set up an adverse possessory right and asserted that the court was without summary jurisdiction and the matter of his right could only be determined in a plenary suit. The referee entered the summary turnover order, which was affirmed on appeal. The concluding paragraph of the opinion is:

> "Our conclusion is, that petitioner's adverse possessory claim is a fallacious conception of his rights and wholly without merit."

On p. 308, the court said in part:

> "It further appears from his return that the Hotel Company was adjudged a bankrupt on that petition on Nov. 14, 1922. So that Eppley, when he made his contract, took possession of the properties, made payments on the purchase price and made the other expenditures for which he claims an equitable lien and the right to remain in possession until that lien is discharged, knew that the properties were then in the custody of the law and that the bankrutpcy court had jurisdiction over them and the bankrupt, and that he could not obtain an adverse right to or interest in them while that proceeding was pending without the consent and under and pursuant to the orders of that court. Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 301, 32 Sup. Ct. 96, 56 L. Ed. 208; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568; 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305; In re Sage, 236 Fed. 644, 194 CCA 640; In re Diamond's Estate, 259 Fed. 70, 170 CCA 138; Bailey v. Baker Ice Machine Co., 239 U. S. 269, 36 Sup. Ct. 50, 60 L. Ed. 275. His conduct was an interference with the jurisdiction of that court and its right and duty to effectively proceed in that cause."

From these and other authorities, the conclusion is inevitable that any claim the respondent might have asserted to the funds in question would be "without any legal justification" and, therefore colorable only and would not oust the referee of summary jurisdiction. *May vs. Henderson,* 269 U. S. 119, 45 S. Ct. 456, 69 L. Ed. 875; *Harrison vs. Chamberlain,* 271 U. S. 191, 46 S. Ct. 467, 70 L. Ed. 897.

4.

The Court has the same summary jurisdiction to order the delivery of money or bank deposits as it has to order the delivery of tangible property, real or personal.

The respondent in the hearing below suggested that the law applicable to the turning over of tangible property would not apply to bank accounts and money.

It was suggested that a bank deposit is a mere debtor and creditor relation so only a plenary suit for money judgment would lie. Such a suggestion is without merit, as shown by numerous holdings of the courts. We have already referred to the case of *May vs. Henderson,* 268 U. S. 111, 45 S. Ct. 456, 69 L. Ed. 870. The Court therein stated "a summary order may be made directing repayment of money to the trustee in bankruptcy." The court also held in that case that a summary accounting could be ordered. The Court said "the duty of a fiduciary to account for property entrusted to his care is fulfilled by delivery of the property; but if he has put it out of his power to deliver it, he may nevertheless be compelled to account for its worth * * *. He is subject to the summary order of the bankruptcy court to restore the property to the bankrupt's estate. If he has sold it or mingled it with his own, he may be compelled by summary order to restore the value of the property thus wrongfully diverted."

In the case of *Knapp & Spencer Co. vs. Drew* (CCA 8), 160 Fed. 412, the court upheld the summary order of the referee to repay money collected from the bankrupt after the filing of the petition in bankruptcy. There is no contention that the appellant in that case had kept the

money in specie separate and apart from his own funds.

In the case of *Reed vs. Barnett National Bank* (C. CA 5), 250 Fed. 983, the summary jurisdiction over a bank account which the bank had appropriated and applied on its note was upheld.

In re *Davis* (D. C., Texas), 119 Fed. 950, the court summarily ordered a bank to restore the bankrupt's deposit which the bank had appropriated on its own indebtedness and deliver the same to the trustee in bankruptcy.

In re *Walker Grain Co.*, (CCA 5), 295 Fed. 120, the rule is stated in paragraph 2 of the syllabus as follows:

> "A creditor which received payment from a bankrupt after the filing of a petition against it with knowledge of such a petition is without color of right to retain the money and may be required to pay it to the trustee by summary order of the bankruptcy court."

In re *Radley Steel Const. Co.* (D. C., New York), 212 Fed. 462, the rule is stated in paragraph 2 of the syllabus as follows:

> "The right to draw checks against an account in a bank distinguishes the position of the bank from that of an ordinary debtor and gives the bankruptcy court the right to order payment to the trustee of such deposits as are not claimed by the bank on some other ground than its holding as a depository."

The collection and mingling of funds of the bankrupt after adjudication is therefore no bar to the summary jurisdiction of the court.

From a review of the above authorities, the conclusion must inevitably be reached that the referee had jurisdiction of the subject matter of the turn-over order. If the respondent was in the territorial jurisdiction of the referee so that service of process could have been had upon it, or if it submitted itself to the jurisdiction of the court, it must be held that the referee was acting within his authority. This was the view taken by the referee and the District Court and the correctness thereof is apparently conceded by the opinion of the Circuit Court (R. 47-48).

5.

The Bankruptcy Court has jurisdiction to adjudicate adverse claims on property in its possession.

It might be argued with some force that the Bankruptcy Court had constructive possession of the funds in question, the respondent being a mere agent of the trustee for the purpose of collection.

Section 70 (a) of the Bankruptcy Act (U. S. Code Tit. 11 §110) vests in the trustee the property and rights, real and personal belonging to the bankrupt, as of the date he was adjudged a bankrupt. The money affected by the referee's order in the present case was, by operation of the statute, placed in the constructive possession of the Bankruptcy Court from the date of its receipt by respondent. The excess collateral mortgages from which the money was derived were in constructive possession of the court from the date of the adjudication in bankruptcy. It is well settled that if the Bankruptcy Court has possession, either actual or constructive, it has sum-

mary jurisdiction, to consider all questions of liens or claims against said property.

In the case of *Murphy v. John Hofman Co.*, 211 U. S. 562, 53 L. Ed. 327, Mr. Justice Moody, speaking for the Court said:

> "But where the property in dispute is in actual possession of the Court of Bankruptcy; there comes into place another principle, not peculiar to courts of bankruptcy, but applicable to all courts, federal or state. Where a court of competent jurisdiction has taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court having possession of the property has an ancillary jurisdiction to hear and determine all questions respecting the title, possession or control of the property. In courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them."

Whitney v. Wenman, 198 U. S. 539, 49 L. Ed. 1157, Mr. Justice Day, writing the opinion, said:

> "• • • on adjudication, title to the bankrupt's estate becomes vested in the trustee with actual or constructive possession and placed the custody in the bankruptcy court.
>
> "We think the result of these cases is, in view of the broad powers conferred in §2 of the bankrupt act, authorising the bankruptcy court to cause the estate of the bankrupt to be collected, reduced to money, and distributed, and to determine contro-

versies in relation thereto, and bring in and substitute additional parties when necessary for the complete determination of a matter in controversy, that when the property has become subject to the jurisdiction of the bankruptcy court as that of the bankrupt, whether held by him or for him, jurisdiction exists to determine controversies in relation to the disposition of the same, and the extent and character of liens thereon or rights therein."

Taubel-Scott Kitzmiller Co. vs. Fox, 264 U. S. 426, 68 L. Ed. 770, Mr. Justice Brandeis, speaking for the Court, said in part:

"By the Act of 1898, as originally enacted, the power of the bankruptcy court to adjudicate, without consent, controversies concerning the title, arising under either §67e, or §60b, or §70e, was confined to property of which it had possession. The possession, which was thus essential to jurisdiction, need not be actual. Constructive possession is sufficient. It exists where the property was in the physical possession of the debtor at the time of the filing of the petition in bankruptcy, but was not delivered by him to the trustee, where the property was delivered to the trustee, but was thereafter wrongfully withdrawn from his custody; where the property is in the hands of the bankrupt's agent or bailee; where the property is held by some other person, who makes no claim to it; and where the property is held by one who makes a claim, but the claim is colorable only. As every court must have power to determine, in the first instance, whether it has jurisdiction to proceed, the bankruptcy court has, in every case, jurisdiction to determine whether it has possession, actual or constructive. It may conclude, where it lacks actual possession, that the physical possession held by some other persons is of such a nature that the property is constructively within the possession of the court."

U. S. Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 56 L. Ed. 1055;

Isaacs vs. Hobbs Tie & Timber Co., 282 U. S. 734;

Straton v. Andy New, Jr., 283 U. S. 318.

Therefore, it could be held that since the court had at least constructive possession of the property in question, it could adjudicate the adverse claims of all parties and the necessary parties could be brought in by notice served on them wherever they might be. Such a holding would render a discussion of many of the points taken up in this brief unnecessary.

II.

JURISDICTION OF THE PERSON.

1.

The presentation by the trustee of the cross-demand in his answer to the respondent's petition for reclamation, and the power of the court to determine the issue so presented, are sanctioned by Equity Rule 30 and General Order in Bankruptcy XXXVII.

Section 2 of the Bankruptcy Act (U. S. Code Tit. 11 §11) provides that courts of bankruptcy:

> "are hereby invested within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law *and in equity* as will enable them to exercise *original jurisdiction in bankruptcy proceedings*, in vacation in chambers, and during their respective terms as they are now or may be hereafter held, to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, *and determine controversies in relation thereto*, except as herein otherwise provided."

Subject to certain specific exceptions that are not involved in the instant case, original equity jurisdiction "to determine controversies in relation" to collection, reduction to money, and distribution of the estates of bankrupts, is thus expressly conferred upon courts of bankruptcy.

As stated in *Fidelity Trust Company v. Gaskell*, (CCA 8), 195 Fed. 865, at 871:

> "A proceeding in bankruptcy is a proceeding in equity and a district court sitting in bankruptcy, whether in exercising its primary or ancillary jurisdiction, is a court of equity."

The rule is stated in Remington on Bankruptcy, Vol. I, page 48, Sec. 23, as follows:

> "Bankruptcy proceedings are a branch of equity jurisprudence.
>
> "And the rules of equity control rather than those of law; and this is so although certain issues may be triable to a jury by the statute, such jury being the jury to which the chancellor always has the power to refer questions of fact for their advice. • • •
>
> "The bankruptcy court has the incidental power to grant any equitable relief which may be necessary in the administration and distribution of the estate."

Section 38 (4) (U. S. Code Tit. 11 §66) quoted in division 1 of this argument (ante, p. 21) confers upon referees, subject to exceptions not here involved, jurisdiction to perform such part of the duties as are conferred on courts of bankruptcy of their respective districts.

Section 30 (U. S. Code Tit. 11 §53) refers to the Supreme Court of the United States the duty of prescribing

rules, forms and orders as to procedure for carrying the act into force and effect.

This court by No. XXXVII of the General Orders in Bankruptcy, adopted in conformity to said §30, prescribed the following rule of practice:

> "In the proceedings in equity instituted for the purpose of carrying into effect the provisions of the act, *or for enforcing the rights and remedies given by it,* the rules of equity practice established by the Supreme Court of the United States shall be followed, as nearly as may be * * *."

Obviously, except as the privilege of modification is granted to facilitate speedy hearings, the rules of equity practice are applicable, without limitation or reservation, to all equitable proceedings in courts of bankruptcy. Some of the inferior federal courts have disregarded the rules of equity practice in equitable proceedings in bankruptcy, or have asserted that their application is limited and not authoritative. But the order quoted makes it mandatory for courts of bankruptcy to follow the equity rules in all proceedings in equity, as nearly as may be.

Some of the inferior Federal Courts have failed to recognize the broad scope of Order XXXVII and to apply the rules of equity practice in equitable proceedings in Courts of Bankruptcy. We cite here a few illustrative cases.

In *re Cunney* (D. C. Mass.) 225 Fed. 428, the court said:

> "General Order No. XXXVII, applies only to equity proceedings, *properly so called;* and not to summary proceedings in bankruptcy like this" (objections to the discharge of the bankrupt).

In *International Harvester Co. v. Carlson* (CCA 8), 217 Fed. 739, it was said:

> "We do not think that general equity rules can be applied as rules of court in the performance of the administrative work of courts of bankruptcy. They may be looked to for analogies, but not as rules. The Supreme Court, itself, has fixed the rules to govern courts of bankruptcy."

In *re Hughes* (CCA 2) 262 Fed. 501, it is said:

> "We approve of the decision in *International Harvester Co. v. Carlson*, 217 Fed. 736, 133 CCA 430, and hold that the equity rules of the Supreme Court are not rules of court, affecting the administrative work of bankruptcy."

In *No-Leak-O Piston Ring Co. v. Norris*, (CCA 2) 277 Fed. 951, it is said:

> "The equity rules are of limited application in bankruptcy (*In re Hughes*, CCA 262 Fed. 500), yet they furnish a guide to procedure, and this was just as true before the promulgation of the present equity rules as it is now."

In view of some of the holdings of the inferior federal courts, Mr. Remington in his work on Bankruptcy states:

> "This general order (No. XXXVII) has been construed to refer only to suits and proceedings other than the proceedings in bankruptcy themselves, in other words, to suits and proceedings brought in the federal courts in aid of bankruptcy proceedings." (1 Remington Bankruptcy, 3rd Ed. §31.)

Petitioner maintains that general order XXXVII does not admit of such an interpretation. To hold that

this order applies only to plenary suits in equity brought in district courts, as distinguished from summary bankruptcy proceedings, would render the order itself wholly inoperative; because the equity rules by their own inherent force govern the practice in all such plenary suits. The order adopting the equity rules would be purposeless, if so construed, since the existing equity rules apply to all equity proceedings that invoke the general equity powers of the District Courts.

The general and comprehensive terms of the order in question leave no room for the process of interpretation. The order contains no words of limitation that restrict its operation to plenary or ancillary suits invoking the general equity powers of the District Courts. The terms employed may imply a limitation of the order to proceedings *in courts of bankruptcy*. It was only in such proceedings that there was any occasion for the order. It was only "for carrying this act into force and effect" that §30 of the bankruptcy act placed upon this court the duty of prescribing "all necessary rules, forms and orders as to procedure."

There is no departure from this object upon the face of the order requiring conformity to the equity rules. To the contrary, the order employs apt terms to cover the object expressed in §30 of the bankruptcy act. It makes the equity rules of practice apply to proceedings "instituted for the purpose of carrying into effect the *provisions of this act, or for enforcing the rights and remedies given by it.*" Action upon petitions in bankruptcy, voluntary and involuntary, and the various proceedings incident thereto, must be had in the courts of bankruptcy;

and when of an equitable nature, as are most of such proceedings, the General Order XXXVII prescribes the equity rules of practice.

It is submitted that in this case the referee and the district judge properly applied equity rule 30 by refusing to strike and by determining the cross-demand presented by the answer of the trustee; and that this court cannot, with due regard to its high power and dignity, sanction the misreading or false interpretation of General Order XXXVII indulged by the Circuit Court of Appeals in this case.

Equity Rule 30 provides in part:

> "The answer must state in short and simple form any counter-claim arising out of the transaction which is the subject matter of the suit and *may*, without cross-bill, set out any set-off or counter-claim against the plaintiff which might be the subject of an independent suit in equity against him and such set-off or counter-claim, so set up, shall have the same effect as a cross-bill, so as to enable the court to pronounce a final judgment in the same suit on both the original and the cross-claims."

It will be noted from this rule that the defendant is required to set up any counter-claim that he may have, if it arises out of the same transaction, or otherwise the claim will be barred, and it gives him the option at his election of also setting up any counter-claim not arising out of the said transaction upon which he could have brought an independent suit in equity. The purpose of the rule seems to be not only to simplify the form of pleading, but also to allow all the equities between the parties litigated and disposed of in the one action. The

revised rule follows in the main the English rule to the same effect, in which all equitable claims existing between the parties, were allowed to be tried in the one action.

The above construction seems to be the construction given by the majority of the courts, although there are some courts that hold that the revised rule does not allow any action to be pleaded as a counter-claim that could not have been made the subject of a cross-bill prior to the adoption of this rule.

In the case of *Buffalo Specialty Company vs. Vancleef*, 217 Fed. 91, D. C. of Illinois, decision by Judge Sanborn, the purpose and effect of Rule No. 30 was ably stated. The court said in part, on page 93:

> "The language is perfectly clear. If defendant has an independent cause of action in equity against plaintiff, he may counter-claim it. If any corroboration of this view were needed, it is found in the fact that the Supreme Court in adopting the rule omitted the last clause of the English rule which restricts counter-claims to those that can be conveniently disposed of and those which ought to be allowed. Not only was any set-off or counter-claim, which may be the subject of an independent suit, included, but an exception was rejected. Moreover, it has always been held by the English courts that independent causes of action wholly unconnected with the claim of the plaintiff may be counter-claimed * * *. Nor is a counter-claim to be excluded because the plaintiff is a foreigner who could not be sued in England. By invoking the jurisdiction, he consents to be sued there by counter-claim, unless plaintiff be a sovereign not suable without its consent * * *. By adopting the English rule, its construction in England is adopted, at least, to the extent of excluding construction at variance with the plain and explicit

language under such circumstances. The clear meaning of the words should not be rejected on account of supposed inconvenience in applying the rule."

Champion Spark Plug Co. vs. Champion Ignition Co., 247 Fed. 200, D. C. Michigan. The third paragraph of the syllabus is as follows:

"A complainant, who brings a suit in equity in a federal court in a district of which he is not an inhabitant, and in which he has no established place of business, is required to meet in such suit any counter-claim which the defendant may set up under equity rule 30, whether it arises out of the transaction which is the subject-matter of the suit, or is one which might be the subject of an independent suit in equity against him."

In the opinion the court said in part as follows:

"I think, also, that even if this counterclaim did not arise out of such transaction, but might, under the rule, have been the subject of an independent suit in equity against the plaintiff, the same result would have followed, and the court would have had jurisdiction to consider it in this suit. The obvious purpose of the new equity rules is the simplification of procedure and the elimination of unnecessary and inequitable technicalities. It would seem that there could be no valid reason why a plaintiff, who has voluntarily gone into a district outside that in which he is an inhabitant and begun a suit, should not be required to meet any claim in equity which the defendant in such suit may have against him. There is nothing in the language of the rule which restricts the right of a defendant in filing a counterclaim to any particular district. The language used is quite plain, and clearly authorizes such defendant to 'set out any set-off or counterclaim against the plaintiff which might be the subject of an independent suit

in equity against him.' The subject-matter of the present counterclaim certainly might have been the subject of such independent suit. If, therefore, the plaintiff must be held to have known that the defendant was compelled, and therefore permitted, to litigate the subject-matter of such suit, and that consequently by filing its bill in this district it waived its right to object to the jurisdiction of this court over such counterclaim, why should it not also be held that, in view of the right granted by this rule to a defendant to set out any set-off or counterclaim which might be the subject of an independent suit in equity against the plaintiff, the plaintiff must have known that such right existed, that such set-off or counterclaim might be presented against it if it filed its bill, and that, therefore, by filing such bill in this district, it waived its privilege of objecting to such jurisdiction. It seems to me that plaintiff, having selected this court as the forum of a suit against the defendants must, in view of this rule, be considered to have known that it was submitting to this court in this suit any dispute or issues between it and the defendants cognizable in a federal court of equity, and that it should not now be permitted to split up such disputes and issues and withdraw a part thereof from this court and claim the benefit of its own demands while denying to defendants the right to try out all of the equitable controversies between these parties. It is clear that it was the purpose of this rule to give to defendants this very right. * * * If this language means anything, it means that in such answer a defendant may set out any counterclaim which might be the subject of an independent suit in equity and that the subject matter of such counterclaim is not limited to matters which might, under the old practice, be the subject of a cross-bill.''

The court then cites in support of this construction, the following cases: *Marconi Wireless Telegraph Co. vs.*

National Electric Signaling Co., 206 Fed. 295; *Electric Boat Co. vs. Lake Torpedo Boat Co.*, 215 Fed. 3077; *Goodno vs. Hotchkiss*, 230 Fed. 514; *Harper Bros. vs. Klaw*, 232 Fed. 609.

The Eighth Circuit apparently recognized the same rule in the case of *Dykes vs. Widdows* (CCA 8) 31 Fed. 2d, 747, the court said:

> "But Equity Rule 30 affords a protection against that result in providing an answer may contain, without crossbill, a set-off or counterclaim which might be the subject of an independent suit in Equity, 'so as to enable the court to pronounce a final judgment in the same suit.'"

Whatever conflict there may have been between the lower Courts, the construction of Equity Rule 30 has been definitely fixed by the opinion of this Court in the case of *Champlain Realty Co. v. Brattleboro*, 260 U. S. 360, 43 S. Ct. 149, 67 L. Ed. 306. The Court, speaking through Chief Justice Taft, said:

> "The counter-claim and the set-off and counter-claim in the two clauses are in pari materia, except that the first grows out of the subject matter of the bill and the other does not. That which grows out of the subject matter of the bill must be set up in the interest of an end of litigation. That which does not, may be set up, if the defendant wishes, in one proceeding in equity quickly to settle all equitable issues capable of trial between them in such a proceeding even though they are not related. *Buffalo Specialty Co. vs. Van Cleef*, 217 Fed. 91."

If Equity Rule 30 is applicable in this proceeding, it must be conceded that the lower Court obtained juris-

diction over the respondent when the Trustee in Bankruptcy in accordance with Equity Rule 30 by appropriate allegations in his answer, claimed the cross-relief granted by the Referee. Under Equity Rule 30, it is entirely immaterial whether the cross-relief grew out of the transaction on which respondent's petition was based or grew out of an entirely distinct and unrelated transaction.

2.

If petitioner has misconceived the purpose and effect of the General Order and the Equity Rules are only "to be looked to for analogies" in the case at bar there is still ample reason for approving the procedure followed by the referee. Public policy requires that bankrupt estates be speedily administered without unnecessary litigation. Both parties were before the Court and the procedure adopted adjudicated all the controversies between them.

We have already noted in the preceding sections of this brief that a proceeding in bankruptcy is an equitable proceeding. It is an administration suit, and the adjudication vests the Trustee with title to the property of the bankrupt, and places it in the exclusive custody and control of the court of bankruptcy, and throws upon that court the duty of collecting, reducing to money and distributing the estate of the bankrupt, and of determining controversies relating thereto. These are equitable powers for performance of which the Congress very properly invested courts of bankruptcy with jurisdiction in equity.

Suits for administration, other than in bankruptcy, have furnished frequent occasions for resort to the general jurisdiction of equity. It is the settled rule of this Court that when an equity court in such a suit takes con-

trol of property for the purpose of administration or liquidation, it thereby withdraws such property from the jurisdiction of all other courts, and draws to itself incidental jurisdiction to hear and determine all questions respecting the title, possession or control of such property. This court has applied that rule to protect and enforce the paramount and exclusive jurisdiction of courts of bankruptcy over the property of bankrupt estates, actually or constructively in their possession or control. *Murphy v. John Hofman Co.*, 211 U. S. 562; *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734; *White v. Schloerb*, 178 U. S. 542; *Dayton v. Stanard*, 241 U. S. 588.

A summary and accurate statement of the rule that in such cases the primary jurisdiction is exclusive, as applied by this Court in bankruptcy proceedings, is embraced in the opinion of MR. JUSTICE ROBERTS in *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734, as follows:

> "Upon adjudication title to the bankrupt's property vests in the trustee with actual or constructive possession and is placed in the custody of the bankruptcy court, *Mueller v. Nugent*, 184 U. S. 1, 14, 46 L. Ed. 405, 411, 22 S. Ct. 269. The title and right of possession of all property owned and possessed by the bankrupt vests in the trustee as of the date of the filing of the petition in bankruptcy, no matter whether situated within or without the district in which the court sits. *Robertson v. Howard*, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 S. Ct. 854; *T. E. Wells & Co. v. Sharp*, 125 CCA 46, 208 Fed. 383; *Galbraith v. Robertson-Hilliard Grocery Co.*, 133 CCA 46, 216 Fed. 842, 32 Am. Bankr. Rep. 752. It follows that the bankruptcy court has exclusive jurisdiction to deal with the property of the bankrupt estate. It may order a sale of real estate lying outside the district.

Robertson v. Howard, 229 U. S. 254, 259, 260, 57 L. Ed. 1174, 1177, 33 Sup. Ct. 854, supra; *Re Wilka* (D. C.) 131 Fed. 1004. When this jurisdiction has attached the court's possession cannot be affected by actions brought in other courts. *White v. Schloerb,* 178 U. S. 542, 44 L. Ed. 1183, 20 S. Ct. 1007; *Murphy v. John Hofman Co.,* 211 U. S. 562; 53 L. Ed. 237, 29 S. Ct. 154; *Dayton v. Stanard,* 241 U. S. 588, 60 L. Ed. 1190, 36 S. Ct. 695. This is but an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from the jurisdiction of all other courts which, though of concurrent jurisdiction, may not disturb that possession; and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property. *Murphy v. John Hofman Co.,* 211 U. S. 562, 53 L. Ed. 327, 29 S. Ct. 154, supra; *Wabash R. Co. v. Adelbert College,* 208 U. S. 38, 52 L. Ed. 379 28 S. Ct. 182; *Harkin v. Brundage,* 276 U. S. 36, 72 L. Ed. 457, 48 S. Ct. 268."

It is thus settled by the statutes, rules, orders and decisions, cited above, that jurisdiction in equity is conferred on courts of bankruptcy. The administration of a bankrupt estate is an equitable proceeding. The adjudication of bankruptcy places the property of the bankrupt actually or constructively within the control of the bankruptcy court. The jurisdiction of equity, having once attached, remains for all purposes to the end of the proceeding. The exclusive control of the property draws to the court the power to determine all controversies concerning its title, possession and control. In one respect, at least, the equity power of courts of bankruptcy is broader than the general equity jurisdiction of the federal courts. A court of bankruptcy may, by injunction, stay

proceedings in state courts, and that power is denied to federal courts of general equity jurisdiction.

The cases cited hold that property in possession of a trustee in bankruptcy can not be reclaimed by replevin or any form of action at law or in equity, in any court other than the bankruptcy court of primary jurisdiction. All such controversies are drawn to the bankruptcy court, as an incident of its equitable proceedings for administration and distribution of the property of the bankrupt.

Respondent's only resort for reclamation of property in the actual or constructive possession of the trustee, as an officer of the court, was the presentation of a petition in the equitable proceeding in the bankruptcy court. If a petition to reclaim property in the custody of an equity receiver had been presented to a court exercising general equity powers, the right of the receiver to present a cross-claim by answer, that also involved property rights of the estate in receivership, could not be doubted, in view of equity rule 30. In such case the claim of the petitioner, and the cross-claim of the receiver or trustee, are both, in fact, claims for reclamation of property in the actual or constructive possession and control of the court. Jurisdiction to determine all controversies in relation thereto resides in the bankruptcy court of primary jurisdiction.

Where the court of bankruptcy has power to determine a controversy in a summary proceeding, the trustee ought not to be, and cannot rightfully be denied the privilege of presenting a claim, by answer, that he could exercise under equity rule 30, if the same identical issue

tendered by respondent were presented in a plenary suit in equity for rescission of the sale of the bonds, and for an order for their delivery by the trustee to respondent.

3.

The appellant, by coming into the Bankruptcy Court and seeking affirmative summary relief, thereby gave the Court jurisdiction of its person, as to such issue, and all such defenses, including affirmative claims that may be properly litigated in that summary proceedings. Consent thus given cannot be withdrawn so as to deprive the Court of jurisdiction so obtained.

It is frankly conceded by all parties that a referee has no extra territorial jurisdiction and if the appellant was not in this court, the court could not have acquired jurisdiction by the serving of a show cause order on the appellant beyond its territorial limits. The appellee contends that the appellant, by coming into the bankruptcy court and seeking affirmative summary relief, thereby gave the court jurisdiction of its person as to such issue and all such defenses, including affirmative claims, that may be properly litigated in that summary proceedings. Consent thus given can not be subsequently withdrawn.

The rule was stated in *Operators Piano Co. vs. First Wisconsin Trust Co.,* (CCA 7) 283 Fed. 904, on p. 906 as follows:

> "Likewise, where the adverse claimant is himself a petitioner for relief in a summary proceeding, he opens the door to such defenses as the trustee in bankruptcy possesses, and all such issues and all such defenses (including affirmative claims) may be properly litigated in that summary proceeding. For a litigant cannot himself invoke the jurisdiction of the

court and the particular form of proceeding (summary as well as plenary) and then object to the disposition of the issues which the respondent (the trustee) may raise either as a defense to his petition or as the basis of a counterclaim. The consent thus given cannot be subsequently withdrawn."

The respondent will contend that the above excerpt is mere dicta and, therefore, not a controlling precedent. Whether this expression is necessary to the decision in that case is quite immaterial as the courts have subsequently referred to the quoted excerpt as correctly stating the rule, which is in harmony with the fundamental principles of modern equity practice. The reasons on which this practice is based apply with special force to summary proceedings in bankruptcy.

The Court of Appeals for the Seventh Circuit has, moreover, reaffirmed its holding in *Operator's Piano Company v. First Wisconsin Trust Co.* in the later case of *In re Bennett* (CCA 7) 285 Fed. 351:

"We have consistently upheld the jurisdiction of the bankruptcy court to determine controversies either in summary or in plenary proceedings, where the adverse party either invokes the jurisdiction or consents to a trial of the disputed issues in such proceedings. *Operator's Piano Co. v. First Wisconsin Trust Co.*, CCA 283, Fed. 904. And we might add that we think greater business efficiency and a more speedy administration of estates, together with greater uniformity in rulings, would be attained if all such controversies could, regardless of the objection of the adverse party, be determined in the bankruptcy court, the court having jurisdiction to administer bankrupt estates."

The same principle has been applied by other courts. *In re Pennsylvania Coffee Co.*, (D.C.), 8 Fed. (2d) 98.

In this case the petitioners filed a petition praying that the receiver be required to pay over to them certain moneys he had collected on accounts receivable, alleging that prior to bankruptcy the accounts had been assigned to them. The receiver filed an answer, denying the relief prayed for and also alleged that the assignments were invalid and asked for affirmative relief, praying that the petitioners be directed to pay over to him certain moneys collected on the assigned accounts. The special master found that certain of the assignments were valid and other assignments were void and also found the amount collected by the receiver on valid assignments and the amount collected by the petitioners on the void assignments. These amounts were set off and the petitioners were directed to pay the balance due the receiver. The money was not paid and an order to show cause issued. On this hearing, the petitioners objected to the jurisdiction of the court on the grounds "that the amount to be recovered from them could be recovered only in a plenary action and could not be offset in a summary proceedings of this sort." The court said (8 Fed. 2d. 88):

> "The precise question at issue here has been decided in favor of the receiver by the Circuit Court of Appeals of the Seventh Circuit in case of Operators' Piano Co. v. First Wisconsin Trust Co., 283 F. 904, 906, in which Evans, Circuit Judge, delivering the opinion of the court, says: 'Likewise, where the adverse claimant is himself a petitioner for relief in a summary proceeding, he opens the door to such defenses as the trustee in bankruptcy possesses, and all such issues and all such defenses (including affirmative claims) may be properly litigated in that summary proceeding.' That principle also finds support

in the following cases: In re Brantman, 244 F. 101, 156 CCA 529; In re Berry (D. C.) 247 F. 700; In re Drag (D. C.) 254 F. 474; In re Hollingsworth & Whitney Co. v. Boston, 242 F. 754, 155 CCA 341; Breit v. Moore, 220 F. 97, 135 CCA 573; Lincoln v. People's National Bank (D. C.) 260 F. 4222."

In *Triangle Electric Co. vs. Foutch,* (CCA 8) 40 Fed. (2d) 353, on p. 356 the court stated:

"One who has presented proof of debt has submitted his claim to the jurisdiction of the bankruptcy court, and must be deemed to have consented to the jurisdiction of that court to decide any defense that may be lawfully interposed. In re Carl Dernburg & Son, Inc. (CCA 2) 5 F. (2d) 37. Undoubtedly the bankruptcy court has the right to determine at the threshold whether a claim is really adverse or merely colorable. There is persuasive authority to the effect that a referee in bankruptcy has jurisdiction, on hearing objections to a claim on the ground that the claimant has received a voidable preference, or has knowingly received from the bankrupt a transfer of his property in fraud of creditors, to direct that the claim shall be allowed on return, within a specified time, of merchandise whose transfer constituted such preference or fraud. Metz v. Knobel et al (CCA 2) 21 F. (2d) 317; McCulloch v. Savings Bank (D. C.) 226 F. 309; In re W. A. Paterson Co. (CCA 8) 186 F. 629, 34 L. R. A. (N. S.) 31.

In the case of In re *Dernburg & Son, Inc.,* (CCA 2), 5 Fed. (2d) 37 referred to above, the trustee filed objections to a proof of debt on the ground that the claimant had obtained a voidable preference which he had not surrendered, and moved to have the claim expunged, disallowed, or reduced. The claimant objected to the summary proceedings before the referee, claiming that a plenary suit was necessary. The referee overruled the ob-

jection and proceeded with the hearing. The jurisdiction of the referee was sustained. The rule was stated in the syllabus as follows:

> "Under Bankruptcy Act, Section 57-G prohibiting allowance of claims unless creditor shall surrender voidable preferences, conveyances, transfers, assigns, or incumbrances, referee had jurisdiction to determine whether claimant who made proof of debt had received preferential payments on trustee's objection and motion to expunge proof.

The court in its opinion said:

> "Every person submitting himself to the bankruptcy court in the progress of the case for the purpose of having his rights in the estate determined makes himself party to the suit and bound in the legitimate course of the proceedings. As was said in Wiswall, et al, vs. Campbell, 93 U. S. 347, 23 L. Ed. 923; "A creditor who offers proof of his claim and demands its allowance, subjects himself to the dominion of the court and must abide the consequences."

In re Barnett, (CCA 7) 12 Fed. (2d) 73, the facts were as follows: The bankrupt had leased certain property from the United Cigar Stores and had deposited liberty bonds in the sum of $1,200 to secure the performance of the lease. The lease also under the laws of Pennsylvania gave the lessor a lien on the fixtures. On adjudication in bankruptcy, the United Cigar Stores cancelled the lease. The receiver of the bankrupt sold the fixtures for $625. The United Cigar Stores applied to the referee for an order requiring the trustee to pay it the $625 received from the fixtures. The trustee did not dispute the landlord's right to this property but claimed the liberty bonds. The referee sustained the claim of the trustee and directed the landlord to pay the trustee the

amount realized from the liberty bonds, less the $625 received from the fixtures. The twelfth paragraph of the syllabus is as follows:

> "Claimant's submitting to bankruptcy court, thereby consents to jurisdiction of court to decide any lawful defenses and his rights must be determined according to the bankruptcy act."

Affirming the action of the referee, the Circuit Court said:

> "Where a claimant submits his claim to the jurisdiction of the bankruptcy court, he thereby consents to the jurisdiction of the court to decide any defenses that may be lawfully interposed. In re Dernburg, 5 Fed. (2d) 37."

The opinion of the Chief Justice Waite in *Wiswall vs. Campbell,* 93 U. S. 347, 23 L. Ed. 923, involving a question of jurisdiction under the Bankruptcy Act of 1867 is luminating even if not controlling.

> "Congress, in enacting the bankrupt law, had apparently in view, (1) the discharge, under some circumstances, of an honest debtor, from legal liability for debts he could not pay; and (2) an early *pro rata* distribution, according to equity, of his available asset among his several creditors. Prompt action is everywhere required by law. In *Bailey vs. Glover,* 21 Wall, 346 we said, speaking through Mr. Justice Miller, that "it is obviously one of the purposes of the bankrupt law that there should be a speedy distribution of the bankrupt's assets. This is only second in importance to securing equality of distribution. The act is filled with provisions for quick and summary disposal of questions arising in the progress of the case, without regard to usual modes of trial attended by some necessary delay." The list of debts "entitled to share in the bankrupt's property" (Sec. 5091) is an important element in the settlement of the

estate. Without it there can be no dividend. Hence the necessity for as "quick and summary" a disposal of the question arising under this part of the case as is consistent with a reasonable protection of the rights of the parties in interest. *Every person submitting himself to the jurisdiction of the bankrupt court in the progress of the case, for the purpose of having his rights in the estate determined, makes himself a party to the suit, and is bound by what is judicially determined in the legitimate course of the proceeding. A creditor who offers proof of his claim, and demands its allowance, subjects himself to the dominion of the court, and must abide the consequences,"*

The respondent, by invoking the aid of the bankruptcy court, submitted himself to its jurisdiction and "is bound by what is judicially determined a legitimate course of the proceeding." It opened the door to all "defenses (including the affirmative claims)" that could be litigated in summary proceeding. The respondent, as a matter of law, thus consented to the jurisdiction of the bankruptcy court in this matter, whether such consent was intended or not.

4.

Equitable terms may be imposed by a court as a condition of granting an order of reclamation.

In *Re Hooven-Owens-Rentschler Co.*, (CCA 6) 195 Fed. 424. In Michigan a petitioner for a rescission of a sale and for the reclamation of personal property is under obligation to account for money received in part payment. In approving a referee's order conditioning reclamation on the delivery to the trustee of the money for which petitioner was accountable, the Court said, p. 426:

"We find then, that petitioner, a resident of Ohio (the bankruptcy administration being in Michigan), was, if it rescinded the sale, liable to account to the bankruptcy trustee for the $560.00 received, and was subject to be sued at law *or in equity* in any court having personal jurisdiction over the petitioner. Under these circumstances petitioner invoked the action of the bankruptcy court in the general subject matter. Full personal jurisdiction over it was thereby acquired, and there was neither lack of jurisdiction nor abuse of discretion in directing, in that very proceeding, that petitioner should respond to the trustee for any such liability which in fact subsisted."

The court also said:

"We are holding by opinion this day filed in *Rode & Horn vs. Phipps,* 190 Fed. 414, that this unclassified proceedings by intervening petition in the bankruptcy court, even though they present only legal questions, are so far equitable in form that equitable remedies are appropriate. Much more is this true when the petition seeks, as this one did, whatever equitable relief the court may think proper, and when the remedy given by way of an imposed condition is of, at least, quasi equitable character."

It should be noted in this connection that the prayer of the appellant's petition for reclamation, besides asking for the return of said bonds, prayed "that your petitioner have such other and further relief as may be just and proper."

Remington on Bankruptcy, Vol. 5, page 602, Section 2455, states:

"Proceedings for reclamation, however, are equitable; and, consequently, the owner may be directed, as a condition precedent to the recovery, to

return the payments received by him on account of the purchase price, less suitable allowances for its use, depreciation, etc., where under the local law, such payments might have been recovered by an independent action."

In the case at bar, the trustee in bankruptcy held bonds of the then market value equal to approximately the amount of cash held by the appellant. If the court had found that these bonds were the property of the respondent and the respondent had a right to reclaim them could it be contended that the referee was without authority to require the respondent to pay the money it held as a condition precedent to the delivery of the bonds? It would, indeed, be a travesty on justice to obtain from the court its property and at the same time deny the court the right to order the return of money belonging to the bankrupt estate. If such a right existed, it was necessary for the trustee to set up these defenses in his answer. The trustee would, indeed, have been remiss if he had allowed the respondent to have taken property from his hands and not insisted on the delivery of assets of the bankrupt in the hands of the respondent. He who seeks equity, should do equity. It does not lie in the mouth of the person invoking the jurisdiction of a court of equity to deny that court the right to dispose of all equitable matters existing between the parties. If the petitioner has not enough confidence in the justice and ability of the court in which he seeks relief to be willing to subject himself to that court, he must stay away from the court for all purposes.

5.

Respondent's withdrawal after the issues had been made up and the hearing entered upon did not defeat the jurisdiction, previously attached, to determine the issue raised by the answer of the trustee.

In this case, the answer of the trustee was promptly filed, praying, among other things, for the affirmative relief in question and the matter was set down for hearing on the issues thus presented.

On the date set a continuance was granted at the request of the respondent's counsel. When the matter was taken up on the adjourned hearing, the respondent moved against the trustee's answer, which motion was overruled. The respondent then dismissed its application for reclamation, which the referee granted "only in so far as said petition or application seeks the reclamation of the securities therein described and it appearing that Herbert S. Daniel, Trustee, in his answer is seeking affirmative relief from the Guaranty Trust Company of New York and the issue raised by the pleadings on file should be heard forthwith * * *." (R. 20). It is fundamental that the act of the appellant did not deprive the court of its jurisdiction to proceed with the issue then before it.

Vidal vs. South American Securities Company, (CCA 2), 276 Fed. 855. The rule is stated in paragraph 13 of the syllabus as follows:

> "Where the counterclaims, under which equity rule 30, are substituted for cross-bills against certain defendants, set up causes of action within the jurisdiction of the court as a court of equity, and within its jurisdiction as a federal court because of the citizenship of the parties, except as to one cross-defend-

ant, they should not be dismissed, but should be treated as original bills on the dismissals of the original bill."

In the case of *Buffalo Specialty Company vs. Vancleef,* (D. C.) 217 Fed. 91, the defendant filed an answer under the new equity rule 30, which was in effect a cross suit. The original bill was later dismissed because the question was adjudicated on its merits in another action and the plaintiff contended that the dismissal carried with it the cross suit of the defendant. The court held to the contrary.

6.

The speedy administration of the Bankruptcy Law requires the application of the modern equity practice which permits the adjudication of all controversies between the same parties in one suit.

Prompt administration is required by the bankruptcy act. The act makes ample provisions to facilitate the administration and distribution of bankrupt estates. That purpose has been frequently emphasized by this court in its decisions under the Act of 1898, and also under the Act of 1867. The arm of the bankruptcy court should be the last, of all courts exercising equity powers, to be fettered by unnecessary restrictions in matters of form and procedure. As far as possible the bankruptcy court of primary jurisdiction should be left free to promptly exercise its statutory authoritory to determine all questions concerning the collection and distribution of bankrupt estates.

The repeated holdings of this court are to the effect that referees in bankruptcy have summary jurisdiction

to require the delivery to the trustee of the bankrupt's property in the hands of any person not having an adverse claim thereto; and also to determine adverse claims where the property is actually or constructively in the trustee's possession. (*Mueller v. Nugent,* 184 U. S. 1; *May v. Henderson,* 268 U. S. 111; *Harrison v. Chamberlain,* 271 U. S. 191.

Shall General Order XXXVII be applied in courts of bankruptcy and in bankruptcy proceedings, as distinguished from plenary suits invoking the general equity powers of District Courts? Section 30 of the bankruptcy act assigns to the Supreme Court of the United States the function of making orders to govern the practice in courts of bankruptcy; and the general order in question appears, in terms, to adhere to the statute.

If the equity rules of procedure are to be followed as near as may be in equitable proceedings in courts of bankruptcy, it is apparent that the discarded requirement that cross-demands must be germane to the subject matter of the original petitioner's cause of action, is not a rule of practice in such courts.

There is certainly as much need to simplify the practice in bankruptcy and to facilitate the settlement of cross-demands in one proceeding, as there is in proceedings under the general equity powers of the District Courts.

The new equity rules effected a great and needed reform in the general practice of equity. The court has apparently, by General Order XXXVII, extended the reformation to courts of bankruptcy for the purpose of

simplifying and expediting their proceedings. Will this court suffer the nullification of its progressive rules and orders?

7.

The final decision of the Court is not a test of jurisdiction.

The jurisdiction of the bankruptcy court to decide the issues was not dependent upon the nature of its decision for or against the claimed right of reclamation, nor upon whether its order acting in personam could be enforced within the district where the court sat. It may be conceded that such an order could not be enforced by direct process if the party against whom it ran departed from and kept without the district. That would be true whether he was domiciled within or without the district. A contingency might arise in either case making resort to ancillary proceedings in another district necessary, as was done in *In re Small Shoe Co.* (CCA 2), 5 Fed. (2d) 956. An order acting in personam against a party who is actually before the court, by appearance or process, is nevertheless valid.

8.

Courts of bankruptcy in exercise of their equity powers act in personam and have summary jurisdiction where a party voluntarily appears or can be served with process, regardless of the location of the res or domicile of the party.

The bankruptcy court has power to make an order concerning the disposition of property of the bankrupt against a party actually before it, either by voluntary appearance or by service of process. To this effect is the decision of this court in *Robertson v. Howard,* 229 U. S. 254, 264, cited in other portions of this brief. The power

of the bankruptcy court of primary jurisdiction to order the conveyance of real estate situate in another state was maintained by that decision. The case was cited and its doctrine reaffirmed in the opinion by MR. JUSTICE ROBERTS *in Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S. 734. Other cases holding that orders for delivery or other disposition of the property of bankrupts are essentially equitable in their nature and act in personam and are therefore valid, although the situs of the res is without the district, are: *Alco Film Corp. v. Alco Film Service* (CCA 2), 234 Fed. 55, 57; *Orinoco Iron Co. v. Metzel* (CCA 6), 230 Fed. 40; *In re Britannia Mining Co.* (D. C. Wis.), 197 Fed. 459.

In *Orinoco Iron Co. vs. Metzel,* supra, the court said:

> "Generally speaking, the jurisdiction of courts of bankruptcy in the administration of bankrupt estates extends 'to all matters of bankruptcy without limitation. It is coextensive with the United States'. It knows no state or district boundaries. Thomas v. Woods, supra, at page 590, of 173 Fed., 97 CCA 535, 26 L. R. A., (N. S.) 1180, 19 Ann. Cas. 1080; Lathrop v. Drake, 91 U. S. 516, 517, 23 L. Ed. 414; Babbitt v. Dutcher, 216 U. S. 102, 109, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Staunton v. Wooden (CCA 9th Cir.) 179 Fed. 61, 63, 102 CCA 355. It may order the sale of land in another state, and without ancillary proceedings therein. Robertson v. Howard, 229 U. S. 254, 261, 33 Sup. Ct. 854, 57 L. Ed. 1174. True, the bankruptcy court may not enforce its process or its orders outside the limits of its territorial jurisdiction, that is to say, its jurisdiction must be exercised within its own district; but, having the proper parties before it, it can within its own district make necessary orders to protect its jurisdiction. And a court of bankruptcy in another jurisdiction could, if necessary, entertain ancillary proceedings for the re-

covery of property. Babbitt v. Dutcher, supra, at page 105, of 216 U. S., 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969. And see Elkus, Petitioner, 216 U. S. 115, 30 Sup. Ct. 377, 54 L. Ed. 407.

"A court of bankruptcy, in determining conflicting claims to property in its custody acts essentially as a court of equity; and we think the case presented is within the well-established rule that, where the necessary parties are before a court of equity, it is immaterial that the subject-matter of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the court. In such case the power exists to compel a defendant to do all things necessary which he could do voluntarily to give full effect to the decree against him. Obedience to the decree so made is enforced by means of process against the person. We cite in the margin a few of the many authorities asserting this jurisdiction."

It is of course conceded that the process of the bankruptcy court can not be enforced beyond its territorial limits. If the order of the referee is affirmed it may be necessary to invoke the aid of the court in New York as was done in *In Re Small Shoe Co.*, (CCA 2) 5 Fed. (2d) 956. There the summary turnover order was entered at the domicile of the bankrupt by the court of primary jurisdiction. The bankrupt then left the territorial jurisdiction of the court without complying with the order. The bankrupt was found in Connecticut and the District Court of Connecticut issued a show cause order why he should not be committed for violating the said turnover order. The Circuit Court held the turnover was res adjudicata of the facts and the order could be enforced in an ancillary proceeding either by a direct order of committment for contempt or by the milder course of issuing a show cause order first.

The ultimate enforcement of the decree is not the test of jurisdiction, neither does it follow that because the respondent is a non-resident the order can not be enforced by process in Nebraska. The respondent has an extensive banking business and loans money thruout the country. It may well be that some of the debtors are within the jurisdiction of the Nebraska court so the funds or property of the respondent could be reached by attachment, garnishment or equitable sequestration. In any event the non-residence of the respondent does not militate against the validity of the turnover order in question.

Staunton v. Wooden (CCA 9) 179 Fed. 61, cited in the opinion of the lower court herein, is not in conflict with the doctrine here maintained, nor with the cases last above cited. There was no voluntary appearance by Staunton. He resided without the district in which the bankruptcy proceeding was pending, and an order to show cause was served without the district. Staunton's only appearance was special for objecting to the jurisdiction. It was ruled that the court could not send its process without the District. That holding is not a precedent for the instant case, where respondent voluntarily appeared by a petition for relief in his own behalf. Here respondent was already before the court in an equitable proceeding, and under the reformed practice in equity had submitted its person to the jurisdiction of the court to determine the cross-claim presented in the trustee's answer to its own petition.

III.

ANCILLARY JURISDICTION DOES NOT BAR THE COURT OF PRIMARY JURISDICTION FROM ACTING IF THE NON-RESIDENT PARTY VOLUNTARILY APPEARS BEFORE IT.

The Circuit Court stated (R. 47) "Appellant (now the respondent) does not question the authority of a bankruptcy court, through ancillary proceedings in the territorial jurisdiction of appellant's residence, to order the delivery of the bankrupt's assets, but appellant asserts that it was not subject to the order of the referee in this case although it had filed a petition in reclamation before him." Upholding the contention of the respondent, the Circuit Court apparently held that this case is ruled by *Babbitt v. Dutcher,* 216 U. S. 102, and *Elkus, Petitioner,* 216 U. S. 115, both holding to the effect that under the original bankruptcy act, as passed in 1898, the respective district courts have ancillary jurisdiction in aid of bankruptcy proceedings pending in another district. The theory of the decision here in question seems to be that since such ancillary jurisdiction exists, the court of primary jurisdiction is wholly without power to make a turnover order against any one who is domiciled without its territorial limits. It is submitted that such theory is unsound and in conflict with *Robertson v. Howard,* 229 U. S. 254.

Among other expressions contained in the opinion in the instant case, evidencing the adoption and application of that untenable theory, are the following:

> "The courts of bankruptcy may act in the exercise of their jurisdiction *in their territorial limits,* but there may be ancillary bankruptcy proceedings *in*

other districts, in aid of the bankruptcy court exercising primary jurisdiction. Bank. Act. §2(20); *Babbitt v. Dutcher,* 216 U. S. 102; *Elkus, Petitioner,* 216 U. S. 115; *Lazarus v. Prentice,* 234 U. S. 263. An order by the referee directing appellant, *as a resident of New York,* to surrender to the trustee property which it held there, would be beyond the ordinary powers of the referee. *Staunton v. Wooden,* 179 Fed. 61." (R. ~~47~~ 40.)

"Appellant sought to recover certain bonds to which it claimed title. The trustee sought an order that appellant should pay over money of the bankrupt estate received by appellant, after bankruptcy. The proceedings would not have been more unrelated to each other, if the trustee had sought an order on appellant for the delivery of books and papers, such as was asked in *Babbitt v. Dutcher,* 216 U. S. 102, or an order for the examination of witnesses, such as was asked in *Elkus, Petitioner,* 216 U. S. 115." (R. ~~49~~ 42.)

The ancillary jurisdiction, under the act as it was passed in 1898, is well settled by the cases cited; and, as if some doubt had still existed, subdivision 20 of Section 2 (U. S. Code Tit. 11 §11) was added by amendment in 1910, investing courts of bankruptcy with express power to "exercise ancillary jurisdiction over persons or property within their respective territorial limits in aid of a receiver or trustee appointed in any bankruptcy proceedings pending in any other court of bankruptcy."

The bearing of this existing *ancillary* jurisdiction upon the issue involving the powers of the court of *primary* jurisdiction, was wholly misconcieved and misapplied by the Circuit Court of Appeals. The existence of the ancillary jurisdiction presupposes and affirms jurisdiction of the primary court over the subject of the pro-

ceeding. Aid of the existing primary jurisdiction of another court, is the sole and exclusive object for creation of the ancillary jurisdiction. Ancillary jurisdiction can only be exercised by one district court when primary jurisdiction exists in another bankruptcy court. Where one against whom relief is sought is not within the reach of the process of the primary court, resort to the ancillary jurisdiction of the court of his domicile becomes necessary. *Shortridge vs. Utah Savings & Trust Co.* (CCA 10), 40 Fed. (2d), 328. But such resort is not required where the non-resident party *voluntarily appears* in the court of primary jurisdiction, and presents a petition for summary relief in his own behalf.

The decision by the lower court of the question now under consideration is at war with the holding of this court in *Robertson v. Howard,* 229 U. S. 254, 264, in which it was said in the opinion by MR. CHIEF JUSTICE WHITE:

> "Even if the enlarged powers of a court of bankruptcy over the estate under its control be put out of view, and the subject be looked at as a mere question of equitable jurisdiction, it may not be doubted that a court of equity in one state, in a proper case, could compel *a defendant before it* to convey property situated in another state. *Fall v. Eastin,* 215 U. S. 1, 8, et seq. 54 L. Ed. 65, 69; 23 L. R. A. (N. S.) 924, 30 Sup. Ct. Rep. 3, 17 Ann. Cas. 853, and cases cited. There being thus ample power in the court, it follows, of course that resort to ancillary proceedings was unnecessary. The decision in *Babbitt v. Dutcher,* 216 U. S. 103, 54 L. Ed. 402, 30 Sup. Ct. Rep. 372, 17 Ann. Cas. 969, to the effect that district courts, other than the court in which the original proceedings in bankruptcy are instituted, possess power in proper cases to exert ancillary jurisdiction in aid of the court in which the bankruptcy proceedings are pending,

lends no support to the contention that the court which had full power could not exert its ample authority without invoking the ancillary power of another and different court." (229 U. S. 261-262.)

The Opinion of MR. CHIEF JUSTICE WHITE, *from which* the foregoing excerpt is taken, is an authoritative precedent, condemning the decision of the Circuit Court of Appeals, and upholding that of the referee and the District Court. It condemns the theory of the decision of the Circuit Court of Appeals that because it was possible for the trustee to resort to the ancillary jurisdiction of the District Court for the Southern District of New York, the District Court for the District of Nebraska could not exert its ample authority against the Guaranty Trust Company, *that was already before it with a petition of reclamation,* to make a turnover order involving a fund in its hands collected for the bankrupt estate, after the adjudication of bankruptcy. The opinion of the Chief Justice here cited and relied upon, renders all citations of the lower court, maintaining ancillary jurisdiction, immaterial and inapplicable, and leaves the judgment of the lower court unsupported and foundationless.

IV.

WEIDHORN V. LEVY, 253 U. S. 268, 64 L. ED. 898 IS NOT APPLICABLE TO THE ISSUES RAISED IN THIS CASE.

The Circuit Court opinion cites and quotes from the Weidhorn case as though it had a bearing on the question at issue here. It is hard for the petitioner to follow the reasoning of the Circuit Court in this respect. The question there determined is well summarized in the concluding paragraph of the opinion:

> "Reviewing the entire matter, we conclude that under the language of the Bankruptcy Act and of the General Orders in Bankruptcy a referee, by virtue of a general reference under Order XII, (1), has not jurisdiction over a plenary suit in equity brought by the trustee in bankruptcy against a third party to set aside a fraudulent transfer or conveyance under §70e, and affecting property not in the custody or control of the court of bankruptcy."

If the Circuit Court construed this case as holding that General Order XXXVII only makes the equity rules applicable to independent plenary suits, we can not agree with such a construction. No such issue was there involved. As pointed out in other sections of this brief, such a construction is unwarranted. The equity rules are made applicable to separate plenary suits in equity by their own inherent power. If only applicable to plenary suits, no procedure is prescribed for summary proceedings. It is much more reasonable to believe this court intended by General Order XXXVII to provide rules for a proceeding otherwise unprovided for than to believe this court intended the useless act of prescribing the equity rules to plenary suits where the rules by their own force already necessarily apply.

The *Weidhorn* case, while holding that the referee is without jurisdiction in independent plenary suits, concedes jurisdiction to referee in summary administrative matters. The case at bar is of the latter type and jurisdiction in such matters is now too firmly established by the well reasoned judgments of this court to be subject to question.

V.

THE MERITS OF THE CASE.

1.

The case was correctly decided by the Referee.

On the merits there can be no doubt as to the correctness of the Referee's order. The amounts and dates of collections as well as the amount applied in satisfaction of the bankrupt's demand loan account are all taken from the statements furnished petitioner by the respondent (R. ~~16~~ 36 & ~~41~~). The trustee made no objection to any of these figures; nor is he questioning the respondent's application of part of the funds to satisfy the bankrupt's demand loan account. Error can never be based on findings derived from the respondent's own accounts.

The respondent held excess collateral. After bankruptcy, it collected this collateral. For whom? Necessarily for the benefit of the bankrupt estate as agent of the receiver and trustee. The law implies a proper motive until the contrary is shown.

The respondent may contend that it has a right to retain part of the money as a setoff on the claim it is alleged to have purchased from The Guaranty Company. The referee, the District Court, and the Circuit Court all found against this contention. In the first place, there is no evidence that it ever purchased the claim of The Guaranty Company. No proof was offered at the hearing on this point. No issue was framed or contention made that it was the owner of such a claim, or, if it was the owner, that it claimed the right of setoff. Is it reasonable to believe that respondent would come all the way from New

York to Nebraska to prosecute a reclamation action if it could satisfy an alleged debt by the simple process of applying the funds already on hand?

2.

As a matter of law, no setoff could exist. A debtor can not acquire claims after insolvency and in contemplation of bankruptcy and use them as a setoff. Neither can the liens be obtained on the bankrupt's property acquired after bankruptcy.

As shown in the statement of the case supra, Peters Trust Company was adjudged insolvent and a receiver was appointed by the state court to liquidate its affairs on November 25, 1929. This in itself was an act of bankruptcy. These facts were known to respondent on the 25th when it impounded its bank account. An officer of the bankrupt called on the Vice President of the respondent on November 26th and explained the situation. An involuntary petition for adjudication in bankruptcy was filed on November 27, 1919. On the same day, respondent is alleged to have purchased the claim of The Guaranty Company.

§68 of the Bankruptcy Act, Title 11, §108, U. S. Code, provides:

> "A setoff or counter claim shall not be allowed in favor of any debtor of the bankrupt which (1) is not provable against the estate; or (2) was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy."

The authorities on this point are collected in *Collier on Bankruptcy,* 13th Ed., Vol. 2, p. 1618; *Remington on Bankruptcy,* Vol. 4, p. 182 §§1465-1466.

The burden of proof was upon the respondent to show the assignment was received before bankruptcy and without knowledge of the impending bankruptcy. *Remington on Bankruptcy,* Vol. 4, p. 1466, *In re: Shults* (D. C.) 135 Fed. 623. The respondent offered no evidence and the evidence offered by the trustee was all to the contrary.

Deposits made after the filing of bankruptcy can never be used as a setoff. The rule is stated in *Collier on Bankruptcy,* 13th Ed.; Vol. 2, p. 1614 as follows:

> "Deposits made after the petition against the bankrupt was filed belong to the trustee; the right to setoff only applies to deposits in bank when the petition was filed, although the bank had no notice of it."

The case found on pages 26 to 33 of this brief support this proposition.

VI.

ANSWER TO RESPONDENT'S THEORY.

In view of fact that this case was briefed and argued in both the District Court and the Circuit Court, it may not be out of place to anticipate some of the arguments of the respondent.

The respondent first contends this is a replevin action at law and not a proceedings in equity, relying on

the case of *General Phonograph Corp. vs. Fanning*, (CCA 3) 6 Fed. (2d) 115. In the opinion, the court said:

> "A reclamation proceeding in bankruptcy is, in effect, a proceeding in rem, partaking, except for its summary character, of the legal aspects of a proceeding in replevin. It is directed against property in the possession of another, a trustee in bankruptcy, to regain which a claimant must affirmatively establish his own right to possession by proving ownership, absolute or qualified. And he must do this by allegations and proof sufficient according to the strictest practice to sustain an action in replevin."

The holding is merely that the same strict proof required in replevin actions is also required in a reclamation proceeding. This is far different from holding that a reclamation proceedings in bankruptcy is an action at law and therefore the equity rules do not apply. We have already seen that the referee may make the relief conditional on applicant's doing equity, *In re Hooven-Owens-Rentschler Co.* (CCA 6) 195 Fed. 424 and that the entire proceeding in bankruptcy is a proceeding in equity (Brief p. 37).

Respondent next contends a referee is without jurisdiction to enter a money judgment. In this, we agree. The respondent, however, fails to note the distinction between jurisdiction to enter a money judgment and jurisdiction to make turnover orders. The former is enforced by execution, the latter by committment for contempt. The lower court had this distinction clearly in mind and merely made a turnover order. It did not attempt to enter a money judgment.

The respondent also contends that referee is without summary jurisdiction to adjudicate the rights of adverse claimants if the property is not in the actual or constructive possession of the bankruptcy court. This is admitted. The referee has jurisdiction to see if the asserted claim is real and substantial or merely colorable. If of the latter class, the referee may retain jurisdiction. Here the referee found no adverse claim was asserted and that none in fact existed so proceeded to enter an order on the merits. This procedure has been approved several times by this Court.

The respondent also argued that a right of setoff is an adverse claim and cited several cases where the claimants were allowed to set off bank deposit made prior to bankruptcy. In all of these cases, both the deposit was made and the debt existed before the bankruptcy proceedings were started. Thus mutual debts and mutual credits existed when the petition was filed. In the case at bar, the money was collected long after bankruptcy when no right of setoff could attach. Also the claim must have been purchased by the respondent if purchased at all for the sole purpose of obtaining an illegal preference. Therefore, the proposition and citations of the respondent do not apply here.

CONCLUSION.

On the merits this case presents a bald refusal to turn over to the trustee in bankruptcy the funds and assets of the bankrupt estate. No claim or lien was asserted against these funds and as a matter of law none could be legitimately asserted. The referee under these circumstances had jurisdiction of the subject matter to make the turn over order in question. Since this Court has several times so construed the Bankruptcy Act, this phase of the case is not open to question.

The main contention of the respondent seems to be that the referee was without jurisdiction over the person of the respondent; that the respondent is a non-resident of Nebraska and by coming into Nebraska and invoking the aid of the Bankruptcy Court for its own relief, it did not submit itself to the jurisdiction of the court for counter affirmative relief. This is directly contrary to the holding of the District Court and referee but apparently is the view taken by the Circuit Court.

Such a contention is at war with Equity Rule 30 and General Order XXXVII. This Court by adopting Equity Rule 30 made a much needed reform and took a step decidedly in the direction of progress. It tends to put an end to litigation rather than encourage a multiplicity of actions. Is this reform carried over into bankruptcy proceedings or are bankruptcy proceedings still relegated to the archaic practice abolished by Equity Rule 30? Congress authorized this Court to prescribe rules of practice for bankruptcy proceedings and in obedience to this authority the Court wisely promulgated General Order

XXXVII, thereby adopting the equity rules as far applicable as rules of practice in bankruptcy. Any other construction of the unequivocal language of this General Order is unwarranted and the Order would be without function or purpose.

Even if General Order XXXVII had not been adopted, the best equity practice should be followed in bankruptcy. A bankruptcy proceeding is an equitable administration proceeding. One of the main purposes of the Bankruptcy Act is to provide a speedy and economical administration of the bankrupt's assets wherever located. The administration would be greatly hampered if those present in court, reaping the benefits of the Act, can withhold the property of the bankrupt and refuse to recognize the authority of the court to direct its delivery to the trustee. Why should the trustee be forced to go to the four corners of the United States to seek the assets of the bankrupt when those who hold them are personally present in court? Such a holding would make for inefficiency, delay, and added expense.

The court of primary jurisdiction should have exclusive jurisdiction as far as possible. Ancillary proceedings may be resorted to as an aid to the court of primary jurisdiction but never oust the primary court of jurisdiction over persons before it.

The respondent consented to the jurisdiction of the referee in this matter. This consent may not have been consciously given but as a matter of law coming into a court, invoking its aid, is a grant of jurisdiction over the person as to all matters over which the court might exer-

cise jurisdiction. This consent is not limited to merely defensive matters, but includes all equitable controversies between the parties, whether arising out of the same transaction or out of unrelated transactions. This proposition is grounded on reason and sanctioned by the adjudications of the Federal Courts.

We, therefore, submit that both precedent and reason require the approval of the procedure followed by the referee and District Court and the rejection of the action of the Circuit Court, and respectfully pray that the turnover order here in question be affirmed.

Respectfully submitted,

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